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THE ARBITRATION OF RAILROAD LABOR DISPUTES.

The successful handling of the problems arising out of the recent controversy between the railroads and their employees on the part of the Railroad Labor Board calls attention to the importance of this new experiment in the quasi-judicial determination of labor disputes.

This Board was created by Act of February 28, 1920, c. 91, Title III. Section 304 of this Act (Barnes Fed. Code, 1921 Supp., Sec. 8088e) provides as follows:

"There is hereby established a Board, to be known as the Railroad Labor Board, and to be comprised of nine members, as follows: First, three members constituting the labor group, representing the employees and subordinate officials of the carriers, to be appointed by the President, by and with the advice of the Senate, from not less than six nominees, whose nominations shall be made and offered by such employees in such manner as the Commission shall by regulation prescribe; second, three members, constituting the management group, representing the carriers, to be appointed by the President, by and with the advice and consent of the Senate, from not less than six nominees, whose nominations shall be made and offered by the carriers in such manner as the Commission shall by regulation prescribe; and third, three members constituting the public group, representing the public, to be appointed directly by the President, by and with the consent of the Senate."

The members of this tribunal are not necessarily lawyers. They are appointed for terms of five years, and receive $10,000 per annum for their services. The function of this Board is to compel the arbitration of industrial disputes where the parties to the controversy do not voluntarily submit their case to a tribunal constituted by the parties themselves and known as an Adjustment Board, as provided for by Act of July 15, 1913, Ch. 6, 38 Stat., § 103, entitled Common Carriers and Employees. This Act of July 15, 1913, was not effective. There were no teeth in it. Either party to the controversy could defeat it by refusing to appoint arbitrators. The Act of Feb. 28, 1920, does not repeal the Voluntary Arbitration Act, but simply provides that if the Adjustment Boards therein provided for are not organized by the parties, or are unable to reach prompt decisions, the Labor Board may act: first, on the application of the chief executives of any carrier or labor union; second, on the written petition of not less than one hundred unorganized employees; or third, on the Board's own motion "if it is of the opinion that the dispute is likely substantially to interrupt commerce."

The Board has power to investigate the facts of a railroad dispute and render a decision on such facts adduced in evidence, determining the issues therein in favor of one party or the other. This is a part of its judicial functions. It also has the administrative function of establishing "rates of wages and salaries and standards of working conditions which in the opinion of the Board are just and reasonable." It also is required to make a thorough study of labor conditions on railroads and to compile, classify and publish the results of its investigations and researches.

The Board has power to summon witnesses and compel their attendance. It may order the production of any books or papers and no person is excused from producing such books or papers on the ground that such evidence would tend to incriminate him; it being provided that no natural person shall be prosecuted on account of any testimony so given.

The recent strike controversy between the railroads and their employees appears on the Board's docket as Decision 299, in the case of Big Five Railway Organization v. Ann Arbor R. R. Co.

This case was instituted by the Board on its own motion "in order to develop the causes and true facts and conditions to the

end that all possible measures might be taken to avert the disaster." This declaration shows the strength of this Board over any mere judicial tribunal. It has the power to compel parties to come into court. Neither the railway employees nor the employers had sought the Board's intervention. Nevertheless a case is docketed and the parties brought before the Board and an investigation into the causes of the strike initiated. "The subject and impelling cause of the inquiry," said the Board in its formal decision, "was the threatened general strike of the employees comprising the membership of the above-named labor organizations on practically all the first-class railroad lines in the United States, which, if it had culminated, would have resulted in a national calamity of incalculable magnitude."

Evidence of the cause of the strike was received, witnesses were examined and after a very careful sifting of the evidence, the Board found that the real cause of the strike was the dissatisfaction on the part of the employees with decision No. 147 of the Board, making a reduction in wages.

The importance of this finding is at once apparent. It not only made the cause of the strike public, but showed that it was not directed against the employers, but against the Board itself. The employees had put themselves in the position of attacking a department of the government itself and that was not an issue on which any group in this country, no matter how highly organized, could hope for success.

Since the decision of the Board (No. 299) and the calling off of the threatened strike, the prestige of the new tribunal has been greatly enhanced. After the strike had been abandoned the representatives of the employees and of the carriers announced publicly their intention and purpose to conform to the law and abide by the orders of the Board. The Board then issued the following opinion:

"While the matter is so intensely before the minds of all, the Board deems it expedient and proper to make its rulings and position on some of the points involved so clear that no ground for any misunderstanding can hereafter exist.

"First, when any change of wages, contracts or rules previously in effect are contemplated or proposed by either party, conference must be had as directed by the Transportation Act and by rules of procedure promulgated by the Board, and where agreements are not reached, the dispute must be brought before this Board, and no action taken or change made until authorized by the Board.

"Second, the ordering or authorization of the strike by the organizations of employees, parties hereto, was a violation of Decision No. 147 of this Board, but said strike order having been withdrawn, it is not now necessary for the Board to take any further steps in the matter.

"The Board desires now to point out that such overt acts by either party tending to and threatening an interruption of the transportation lines, the peaceful and uninterrupted operation of which are so absolutely necessary to the peace, prosperity and safety of the entire people, are in themselves, even when they do not culminate in a stoppage of traffic, the cause of great anxiety and damage.

"The Board further points out for the consideration of employees interested that when such action does result in a strike, the organization so acting has forfeited its rights and the rights of its members in and to the provisions and benefits of all contracts thereto existing and the employees so striking have voluntarily removed themselves from the classes entitled to appeal to this Board for relief and protection."

Those interested in the development of tribunals for the compulsory determination of labor disputes will follow the working out of this new experiment by the Federal Government with much interest. We congratulate the Board and the Congress on the auspicious beginning of this new administrative tribunal. Its continued success and that of the Kansas Industrial Court will no doubt lead to the establishment of similar tribunals in other states and particularly with respect to industries where a strike works a great hardship on the people.

NOTES OF IMPORTANT DECISIONS.

IS A DEVISE VOID WHICH IS IDENTICAL WITH ESTATE BY DESCENT?—The Supreme Court of Illinois follows an old commol law rule in refusing to probate a will which did nothing more than appoint an executor and then devise the property to the testator's legal heirs, on the ground that such a devise was void. Lasier v. Wright, (Decided Oct. 22, 1921) 54 Chi. Leg. News 106.

In this case one Haines, a bachelor, died, leaving two wills. The first will devised the property to his mother, his sole heir, and appointed an executor. The latter will left the same property (about $400,000) to his mother for life, remainder to certain charities. The later will did not expressly revoke the former will, and for that reason certain collateral heirs of the testator's mother (since deceased) sought to probate the first will. In holding the first will void the Court said:

"It has long been the settled law of this State, based upon and following the rule of the common law, that a 'devise to the heir-at-law is void if it gives precisely the same estate that the heir would take by descent if the particular devise to him was omitted out of the will. The title by descent has in that case precedence to the title by devise.' (4 Kent's Com.—14th ed.—*506; Akers v. Clark, 184 Ill. 136.) This rule of the common law is laid down by Blackstone (vol. 2, *242,) as follows: 'But if a man seized in fee devises his whole estate to his heir at law, so that the heir takes neither a greater nor a less estate by the devise than he would have done without it he shall be adjudged to take by descent,'—and the rule has been approved by this court for many years. (Kellett v. Shepard, 139 Ill. 433; Akers v. Clark, supra; Biggerstaff v. Van Pelt, 207 Ill. 611; Darst v. Swearingen, 224 id. 229; Wiltfang v. Dirksen, 295 id. 362; Brinkerhoff v. Butler, 296 id. 368.) Various reasons have been given for this rule of law, among others, that it is based on the principle that a man cannot give to another what he has already. (Scott v. Scott, 1 Eden's Ch. 458; Counden v. Clarke, Hob. 29; Godolphin v. Abingdon, 2 Atk. 57.) Again, it has been said that the rule has been adopted in favor of the heir that he might be in of his better title,—that is, the title by descent takes precedence over the title by devise. (Ellis v. Page, 7, Cush. 161.) But some of the authorities say that this cannot be the sound reason, for in that case the heir would be entitled to an election to take either under the will or by descent, as might be most to his advantage: but this he cannot do. (Powell on Devises 21 Law Lib. *421.) This author also says that 'the rule seems rather to be adopted in favor of third persons, viz., of the lord for the preservation of the tenure and of creditors for the preservation of their debts.'"

The Court also held that the mere appointment of executors was not such as to entitle the will to probate. On this point the Court said:

"We see no reason why the will of 1887, under the circumstances shown in this record, the entire devise being void and the executors not living, should be admitted to probate simply for the purpose of permitting the probate court to name an administrator with the will annexed. Such a proceeding would cause additional expense to the estate and result in no benefit to it."

LIABILITY OF COLLECTOR FOR TAXES UNLAWFULLY COLLECTED BY PREDECESSOR.—If a collector of federal taxes unlawfully and over due protest collects taxes can they be recovered from his successor? This was the question decided by the Supreme Court of the United States, Oct. 24, 1921, in its decision in the case of Smietanka v. Indiana Steel Co. (not yet reported.)

The case came before the Court by the certification on the part of the Circuit Court of Appeals of the following question:

"May suit in the District Court of the United States properly be brought and maintained against a United States collector of internal revenue for the recovery of the amount of a United States internal revenue tax, unlawfully assessed and collected, but in the collection and disbursement of which such collector had no agency, the entire transaction of such assessment, collection and disbursement having occurred during the incumbency of such office of a predecessor in office of such collector?"

Before the intervention of any statute the federal law has always been that a collector of taxes was liable to a taxpayer who declared at the time of payment that the tax was unlawful and gave notice to the collector of his intention to sue and warning him not to pay the amount of the tax so collected to the treasury. Elliott v. Swartwout, 10 Pet. 137. A later statute, however, required collectors to pay over tax monies so collected irrespective of any protest. The Court then held that this removed the personal liability of the collector. Cary v. Curtis, 3 How. 236. Later Acts recognize the liability of the collector and provide that the District Attorney defend him and that in certain cases, the amount of the judgment, if any, be paid out of the United States treasury. It was contended by the Steel Company that these statutes recognize suits against collectors and that the liability is attached to the office and not to the man. This, the Supreme Court holds, is not the case and that the liability of the collector is still personal. On this point the Court said:

"To show that the action still is personal, as laid down in Sage v. United States, 250 U. S. 33, 37, it would seem to be enough to observe that when the suit is begun it cannot be known with certainty that the judgment will be paid out of the Treasury. That depends upon the certificate of the Court in the case. It is not to be supposed that a stranger to an unwarranted transaction is made answerable for it; yet that might be the result of the suit if it could be brought against a successor to the collectorship. A personal execution is denied only when the certificate is given. It is true that in this instance the certificate has been made, but the intended scope of the action must be judged by its possibilities under the statutes that deal with it. The language of the most material enactment, Rev. St., § 989, gives no countenance to the plaintiff's argument. It enacts that no execution shall issue against the collector but that the amount of the judgment shall 'be provided for and paid out of the proper appropriation from the Treasury,' when and only when the Court certifies to either of the facts certified here, and 'when a recovery is had in any suit on proceedings against a collector or other officer of the revenue for any act done by him, or for the recovery of any money exacted by or paid to him and by him paid into the Treasury, in the performance of his official duty.' A recovery for acts done by the defendant is the only one contemplated by the words 'by him.'"

FREE SPEECH AND LAWS IN DEROGATION THEREOF.

Grote[1] has emphasized the influence of public speaking on the ancient Greeks, as follows:

"That its development was greatest among the most enlightened sections of the Grecian name, and smallest among the most obtuse and stationary, is matter of notorious fact; nor is it less true, that the prevalence of this habit was one of the chief causes of the intellectual eminence of the nation generally * * * *. If the primary effect was to quicken the powers of expression, the secondary, but not less certain result, was to develop the habit of scientific thought."

And further:

"It was the blessing and the glory of Athens that every man could speak out his sentiments and his criticisms with a freedom unparalleled in the ancient world, and hardly paralleled in the modern, in which a vast body of dissent is and always has been condemned to absolute silence."[2]

The qualifications of Grote to speak thus authoritatively on the effect of free speech on a people is derived from his broad study both of the ancient and modern world. For it is to be borne in mind that his History of Greece is a study not of Greece alone, but of the civilized world during the period of which he wrote, and that he lived in an age in which the freedom of speech had been but recently achieved after a long and arduous struggle. And the patent truth of his last remark has been too often demonstrated in our own country in the last few years to need extended elucidation. Espionage Acts, Criminal Syndicalism legislation and legislation against sedition have become so numerous and have been followed by such wholesale arrests, prosecutions, incarcerations and deportations that one has at times wondered where and when it would all end or whether or not one was free to utter an honest opinion in reference to one's country's weal or woe.

And all this repressive legislation has been enacted and enforced in the face of our Bill of Right, embodying the long and generally recognized principle that in this country anyone has "the right to publish, with impunity, truth, with good motives, for justifiable ends though reflecting on government, magistracy, or individuals."[3] Moreover, we have had the First Amendment to the Constitution of the United States as follows:

"Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof; or *abridging the freedom of speech or of the press;* or the right of the people peaceably to assemble and petition the Government for a redress of grievances."

What are good motives and justifiable ends in the definition before quoted are questions on which persons may differ

(1) 2 History of Greece, 77.

(2) 8 Id., 348.

(3) Chafee, Freedom of Speech, 30, n.

and in reference to which there may be some confusion. The line of cleavage between what it is right to publish and what it is wrong to publish is not always clear. A man has no right to shout "fire" in a crowded theatre, to use a familiar illustration. Neither has he the right to publish that which might give an advantage to the public enemy. Such matters are fairly clear. But where we oftenest lose our bearings, if not our heads, is when government is criticized. If the times are excited and public sentiment runs high, it is then that the freedom of speech is endangered. In this connection the case of John Wilkes is in point. He had published in his "North Britain" newspaper an editorial assailing Lord Bute's administration, and after the downfall of that minister continued his attacks upon the government, even accusing the King of falsehood. The House of Commons declared the paper in question a seditious libel, ordered it burned and passed a special act for the author's prosecution. Prof. Chaffee[4] quotes the following from Burke on this crucial case as having the greatest value for our own time:

"Accumulative crimes are unknown to the courts below. In those courts two bad things will not make one capital offense. This is a serving up like cooks. Some will eat of one dish, and some of another, so that there will not be a fragment left. One honorable member could not bear to see Christianity abused, because it was a part of the common law of England. This is substantial roast-beef reasoning. One gentleman said that he meant Mr. Wilkes' petition to be the ground of expulsion; another, the message from the House of Lords. 'I come into this resolution,' says a fourth, 'because of his censure of the conduct of a great magistrate.' 'In time of danger,' says a fifth, 'I am afraid of doing anything that will shake the government.' These charges are all brought together to form an accumulated offense, which may extend to the exclusion of every other member of this House. This law, as it is now laid down, is that any member, who, at any time, has been guilty of writing a libel will never be free from punishment."

Sentiments like these stand as a warning against interference with freedom of speech except in cases of the greatest public exigency. Though Burke is speaking of the expulsion of Wilkes, the point he makes against the bringing together of different charges, so that all phases of opinion may be enlisted for conviction, can be charged with equal propriety against our espionage acts and laws to punish criminal syndicalism. These laws group together a vast and varied list of acts, any one of which one may not do or attempt to do without running afoul of the authorities. For example, one who even "attempts to justify by word of mouth or writing the commission or attempt to commit sabotage, any act of physical violence, the destruction or damage to property, the injury of any person or the commission of any crime, with intent to exemplify spread or teach, or affirmatively suggest criminal syndicalism," etc., shall be guilty of a felony and liable to one to ten years imprisonment or a fine of one thousand dollars, or both fine and imprisonment.[5]

If there is ever a wish at any time to let loose the agents of government against anyone of pronounced and outspoken opinion in opposition to constituted authority, so long as laws of this kind remain on the statute books, warrant is not wanting for doing it or means lacking for conviction. The language of the statute does not even permit one to gain salvation by repentance. If one attempt and afterwards repent of the attempt and goes no further with the undertaking, one is punishable anyway. Such language is calculated to induce one to put his attempt into execution at all hazards, because he may reason that

(4) Freedom of Speech, 314.

(5) Laws of Neb. for 1919, Ch. 261.

if he has got to die anyhow he may as well die in the full knowledge of having accomplished his purpose. Indeed, the statute is so worded that one could be punished for a remote tendency, an outward appearance or an apparent leaning toward the crimes invented. And when we consider that laws of this character are apt to be enforced in times of public turbulence and excitement, it may be readily inferred that there will be, under such circumstances, many unjustifiable convictions, and abuses of authority verging upon if not having all the attributes of persecution. At such times spies are everywhere and the informer and procurer bloom and flower with tropical luxuriance. Men are hunted and hounded and haled before boards and commissions and into courts charged with crimes on the most flimsy evidence, on suspicion, for the expression of an honest and conscientious opinion, or because found visiting with those held under suspicion. During the late Communist raids under orders from the Department of Justice persons were taken into custody merely because they called to see their friends in jail, "for their coming to inquire was *prima facie* evidence of affiliation with the Communist Party."[6]

In order to show how far even judges may be carried away by a present fever of excitement Prof. Chafee[7] quotes Judge Aldrich, of New Hampshire:[8]

"These are not times for fooling. The times are serious. Nobody knows what is going to happen to our institutions within the next year, or the next month. Out West they are hanging men for such things as this man is accused of saying. They are feeling outraged by such expressions to such extent that they are taking the law into their own hands. Now, that is a very bad thing to do. We do not want that to happen in New Hampshire, but we want a courageous enforcement of the law."

(6) Chafee, Freedom of Speech, 246.

(7) Freedom of Speech, 81.

(8) United States v. Taubert.

Taubert had said that this was a Morgan war and not a war of the people, and was sentenced to three years for obstructing bond sales, it being held that "the government must not be embarrassed by unreasonable opposition," though the Act of 1917 says nothing about bond sales. One is instinctively reminded by exudations of the kind of this learned judge of that honest but obstinate old nobleman in Dicken's "Bleak House," Sir Leicester Dedlock, who was forever seeing the foundations of government undermined and the reincarnation of some Guy Fawkes with another Gun Powder Plot to blow up the Houses of Parliament.

The reasons given for the passage of such laws as the Espionage Act and laws against seditious acts and utterances, which are so drawn as to punish for things so occult as to be practically a guess at what is inside of a man's head, are that they conduce to law and order and tend to inculcate a greater respect for legal authority. But do they do these things? They never have. An idea is an idea and is so much a part of its possessor as to be incapable of eradication by mere legislative enactment. That has been tried time and again and has always failed. It may be done by precept and example, but legislation can at most only succeed in preventing its vocal expression. But if the idea does not find vent in one way it will in another. If a man be denied the right to speak his sentiments, he is apt to vent them in overt acts—in bomb-throwing or plots against government, or in destroying life and property. In his brief for the New York Socialist Assemblymen Justice Hughes said that "Hyde Park meetings and soapbox oratory constitute the most efficient safety-valve against resort by the discontented to physical force."[9] And Mr. Justice Holmes has said, in his character-

(9) Chafee, Freedom of Speech, 189.

istically happy vein, "with effervescing opinion, as with the not yet forgotten champagnes, the quickest way to let them get flat is to let them get exposed to the air."[10]

After two attempts had been made on the Emperor of Germany's life Bismarck had a law enacted "against the generally dangerous efforts of Social Democracy," then advocating the overthrow of capitalistic society by forcible revolution. The party prospered under the law more than ever before. The law was repealed, and the party became conservative.[11] Legislation to break up Trade Unions in England only strengthened the Unions and increased the bitterness of their members.[12] And drastic action against the Industrial Workers of the World has merely served to shunt numerous members of that organization into the American Federation of Labor, where they can do infinitely more harm.[13] Scarcely more truthful words could be uttered concerning the effect of suppression upon the community than those used by Hume in his History of England. He is speaking of religious persecution, but his words are just as applicable to suppression of secular forms of belief. They are:

"Where a violent animosity is excited by oppression, men naturally pass from hating the persons of their tyrants to a more violent abhorrence of their doctrines; and the spectators, moved with pity toward the supposed martyrs, are easily induced to embrace those principles which can inspire a confidence which appears almost supernatural."

Returning for a moment to the beginning of this article, it was said that habits of unrestrained public speaking by the Greeks resulted in the development of the habit of scientific thought. This was one of the prime considerations of the framers of the First Amendment. In of the press. "The importance of this," 1774, the Continental Congress, addressing the inhabitants of Quebec, declared that the English Colonists had five invaluable rights, the last being the freedom they say, "consists, besides the advancement of truth, science, morality and arts in general, in its diffusion of liberal sentiment on the administration of government, its ready communication of thoughts between subjects, and its consequential promotion of union among them, whereby oppressive officials are shamed or intimidated into more honorable and just modes of conducting affairs."[14]

And Jefferson's words in the Virginia Act establishing Religious Freedom are as true of the dangers of allowing the magistrate to intrude his powers into other fields of opinion as into the field of religion:

"To suffer the civil magistrate to intrude his powers into the field of opinion and to restrain the profession or propagation of principles on supposition of their ill tendency, is a dangerous fallacy, which at once destroys all religious liberty, because he being of course judge of that tendency, will make his opinions the rule of judgment, and approve or condemn the sentiments of others only as they shall square with or differ from his own." [15]

And in the final analysis it will be probably found that the opinion of the magistrate will be very much the same as that of his environment. "I have now completed my review of the history of Witchcraft," Lecky informs us. . . . . "I have shown that witchcraft resulted, not from isolated circumstances, but from modes of thought. . . . . Arising amid the ignorance of an early civilization, it was quickened into an intenser life by a theological struggle which allied terrorism with credulity, and it declined under the influence of a great rationalistic movement which, since the seventeenth century, has been on all sides encroaching on theology.[16]

(10) 21 The New Republic, 250.
(11) Chafee, Freedom of Speech, 263.
(12) Id., 192.
(13) Id., 193.
(14) Chafee, Freedom of Speech, 17.
(15) Chafee, Freedom of Speech, 31.
(16) 21 The New Republic, 250.

The point is, judges—except the more conservative—and juries see red because they are in an environment of red, because the very air they breathe is surcharged with the red hysteria. Judge Aldrich, above quoted, was a victim of this sentiment, and because men were being hanged out West for opinions it was proper to send a man to the penitentiary because he said this was a Morgan war—a mere opinion, not true of course, but one that many held and uttered during those trying days.

Men get in the habit of thinking that radical and irrational treatment of those who differ from them in opinion is in the interest of law and order, when in point of fact it is but a reflection of present sentiment blinding them to what the law and the facts really are. Three years from the world war many still believe most of the propaganda that was bruited about the country during that terrible holocaust, yet Judge George W. Anderson, whose intimate association with those charged with the discovery and prosecution of those connected with pro-German plots, should constitute him a competent witness, has said:

"Now, I assert on my best judgment, grounded on the information I can get, that more than ninety-nine per cent of the advertised and reported pro-German plots never existed. I think it is time that publicity was given to this view. I doubt the Red menace having more basis in fact than the pro-German peril. I assert the significant fact that many of the same persons and newspapers that for two years were faking pro-German plots are now promoting the Red Terror. . . . . I cannot say there will not be some bomb-thrower. A fraction of one per cent of the pro-German plots actually existed. There are Reds—probably dangerous Reds. But they are not half so dangerous as the prating pseudo-patriots who, under the guise of Americanism, are preaching murder, 'shooting-at-sunrise,' and to whom our church parlors and other public forums have hitherto been open. . . . The heresy-hunter has throughout history been one of the meanest of men. It is time we had freedom of speech for the just contempt that every wholesome-minded citizen has and should have for the pretentious, noisy, heresy-hunter of these hysterical times."[17]

The truth is, in the passage of many laws by Congress and the State Legislatures for the searching out and punishing of every utterance, phase of opinion and shade of thought that can possibly be tortured into a criticism of government, we as Americans have lost our perspective. We call it Americanism. It is the remotest possible thing from Americanism. Americanism means freedom of thought, speech, action, locomotion and opportunity insofar as their exercise does not interfere with the just rights of others. It means the right to criticise public officers and public modes of administration, to point out mistakes, suggest improvements and in general to do and say all things that we presume to be for the common good. And this presumption is not to be construed in any narrow sense either, for commonly no man can say to a dead certainty that another is wholly wrong. It no doubt seemed very absurd to the people of his day for Galileo to assert that the earth moved, and yet the truth of his theory is now universally conceded. Columbus set down as a fundamental axiom that the earth was a terraqueous sphere, and those of his day looked at him askance. Yet we have long known he was right. What may appear a monumental absurdity today may be found to be a mighty truth tomorrow. And all along the line of discovery, invention, improvement and progress the forerunners of these have been called dreamers, cranks and fools. Given time, one will prove one's thesis to be true or one's opponents will prove it to be untrue.

Nor is one under the liberal rules laid down by the framers of the First Amendment bound to be entirely temperate in his language when opposing what he believes to be wrong. The more a man feels an injustice is being done the more apt he is to clothe his thoughts in colorific expressions

(17) 21 The New Republic, 251.

of vituperation. One does not always pause to control one's language under strong feeling in the denunciation of that which one conceives to be pernicious. To be sure, there is a point where freedom of speech must stop, as has been said before, but such abuses are substantially all taken care of by the normal law, so that the wrongdoer, if the law be enforced, cannot escape the consequences of his misdoings. But this normal law does not militate against the right of anyone to speak the truth, with good motives and for justifiable ends, about any public matter or policy or individual.

If we go back to the period in which the framers of the First Amendment lived, we shall readily understand why they were so palpably jealous of the freedom of speech. They lived in the days of the persecution of Wilkes because of his contention for the right of a free press. The echoes of that titanic struggle, marking the culmination of years of effort on the part of the English people for rights they had almost despaired of achieving, were still ringing in their ears. The First Amendment was written by men to whom Wilkes and Junius were household words. (Chaffee, Freedom of Speech, 23). They had seen this great reform accomplished in the Mother Country. They could not afford to risk its loss to the Republic. As was said by the Supreme Court of Nebraska.[18]

"The privilege of speaking and publishing the truth with good motives and for justifiable ends was not inserted in the Bill of Rights by accident. The doctrine that the truth as to a man's conduct is no justification for publishing it in the press originated in the Star Chamber, and was in high favor in that tribunal when printing became an effective means of disseminating what honest men said about the abuses of official power and conduct and policies of public men. The hostility to such a restriction of free speech and of a free press resulted in the adoption of section 5 of the Bill of Rights."

(18) State vs. Junkin, 85 Neb. 1.

And so we have seen men of outstanding character and ability and of the most sterling Americanism contending valiantly throughout our national life for this right and other related rights. Hamilton defended the British Loyalists, John Adams the British soldiers engaged in the "Boston Massacre," James Madison opposed the Alien and Sedition Laws, while Charles Evans Hughes came bravely to the defense of the New York Socialist Assemblymen. With these splendid examples of true Americanism for our guidance there is hope of our eventual escape from the present hysteria of un-American legislation, state and national, which stands as a blot upon over a hundred years of uninterrupted freedom of speech in this country and in derogation of the First Amendment to the Federal Constitution, in force in 1791. In this matter of speech we may well copy after the ancient Athenians, the scientific attainments of whom have been attributed by eminent authority to their unrestricted interchange of thought. Above all, we should ponder deeply the reasons why the founders of our state were so profoundly sensitive of the preservation of freedom of speech as to insist on its specific reservation in the First Amendment. For we need to reflect that the danger to our future may be far greater from suppression of speech than from the fulmination of doctrines which we dislike or detest.

ELWOOD S. JONES.
Rising City, Neb.

UNFAIR COMPETITION—CARTOONS.

FISHER V. STAR CO.

132 N. E. 133.

Court of Appeals of New York, July 14, 1921.

CHASE, J.—This action is brought to enjoin the appellant from what the respondent asserts is unfair competition in making and publishing cartoons. The question on this appeal is whether the courts should use the equitable

jurisdiction given to them to restrain a person or corporation from using in a cartoon, or in cartoons prepared for publication and sale as a business, certain grotesque figures, being imaginary and fictitious characters and the names applied to them, when such figures and names were originated and have been applied and used by a person in connection with his work as a cartoonist until they have become well known and have as such figures or characters, with their names, a definite place among cartoonists and the admirers of cartoons, and with the public at large, and as such are of substantial value. The plaintiff does not assert his right to injunctive relief by virtue of the copyright law, the enforcement of which is confined to the federal courts. U. S. Compiled Statutes 1918, §§ 9555, 9556. He does not assert his claim by virtue of the federal Trade-Mark Law (Act Feb. 20, 1905 [U. S. Comp. St. §§ 9485,-9487-9511, 9513-9516] or the statutes relating to trade-marks in this state (see Laws of 1909, cc. 9, 25, 36, and 88; Penal Law, §§ 2350 to 2357 [Consol. Laws, c. 40]), or in other states.

The statute creating the Federal Trade Commission (Act Sept. 26, 1914, [U. S. Comp. St. §§ 8836a-8836k]) and giving it authority to prevent unfair methods of competition does not apply to unfair methods between individuals. The unfair methods contemplated by the act are such as affect the public generally. Federal Trade Commission v. Bratz, 258 Fed. 314, 169 C. C. A. 330, 11 A. L. R. 793. To sustain his claim the respondent relies entirely upon the authority of the courts in equity to prevent what is known as unfair competition.

A person who uses an unregistered name or mark can prevent others using the same so as to deceive the public into thinking that the business carried on by such persons and the goods sold by them are his. 27 Halsbury's Laws of England, 744. Such conduct as is calculated to deceive the public into believing that the business of the wrongdoer is the business of him whose name, sign, or mark is simulated or appropriated can be restrained in equity. Ball v. Broadway Bazaar, 194 N. Y. 429, 87 N. E. 674; Westcott Chuck Co. v. Oneida National Chuck Co., 199 N. Y. 247, 92 N. E. 639, 139 Am. St. Rep. 907, 20 Ann. Cas. 858; Singer Mfg. Co. v. June Mfg. Co., 163 U. S. 169, 16 Sup. Ct. 1002, 41 L. Ed. 118; Fox Co. v. Glynn, 191 Mass. 344, 78 N. E. 89, 9 L. R. A. (N. S.) 1096, 114 Am. St. Rep. 619.

The courts are not confined in the exercise of their equitable powers to preventing unfair competition among the manufacturers of and dealers in goods. The controlling question in all cases where the equitable power of the courts is invoked is whether the acts complained of are fair or unfair. The determination of this appeal depends first and primarily upon the facts. Higgins Co. v. Higgins Soap Co., 144 N. Y. 462, 39 N. E. 490, 27 L. R. A. 42, 43 Am. St. Rep. 769; Howe Scale Co. v. Wyckoff, Seamans, etc., 198 U. S. 118, 25 Sup. Ct. 609, 49 L. Ed. 972; Kroppf v. Furst (C. C.) 94 Fed. 150. The inquiry is whether the use of the names "Mutt' and "Jeff" and the grotesque figures to which the names are applied by the appellant would be unfair to the respondent. A statement of the facts found at the special term has been given preceding this opinion, at unusual length, because it will obviate the necessity of stating many of them in the opinion, and also because the true basis of the decision herein cannot be fully understood without a complete knowledge of the facts on which it depends. Baker & Co. v. Sanders, 80 Fed. 889, 891, 26 C. C. A. 220. The facts as found were unanimously affirmed at the Appellate Division (Fisher v. Star Co., 188 App. Div. 964, 176 N. Y. Supp. 899), and are conclusive upon this Court. Constitution, art. 6 § 9; Porter v. Municipal Gas Co., 220 N. Y. 152, 115 N. E. 457.

The rules stated as to competition in business apply to the publication of books under a particular name. Such a name is the subject of property, and a colorable imitation of the name adopted by one publisher, by another engaged in publishing similar books by which the public may be easily misled into supposing that it was the literary article they desired to obtain, is an act of deception which injures the publisher who first adopted the name and which he may call upon a court of equity to redress. Munro v. Tousey, 129 N. Y. 38, 29 N. E. 9, 14 L. R. A. 245.

Trade-marks may consist of pictures, symbols of a peculiar form, or fashion of label, or they may consist simply of a word or words. Hier v. Abrahams, 82 N. Y. 519, 37 Am. Rep. 589. Any civil right not unlawful in itself nor against public policy, that has acquired a pecuniary value, becomes a property right that is entitled to protection as such. The courts have frequently exercised this right. They have never refused to do so when the facts show that the failure to exercise equitable jurisdiction would permit unfair competition in trade or in any matter pertaining to a property right.

In International News Service v. Associated Press, 248, U. S. 215, 39 Sup. Ct. 68, 63 L. Ed. 211, 2 A. L. R. 293, the Associated

Press sought to enjoin the International News Company from appropriating for commercial use matter taken from bulletins or early editions of Associated Press publications as constituting unfair competition in trade. It was not claimed that the news articles were protected by copyright. The court say:

"We need spend no time, however, upon the general question of property in news matter at common law, or the application of the copyright act, since it seems to us the case must turn upon the question of unfair competition in business. * * * In order to sustain the jurisdiction of equity over the controversy, we need not affirm any general and absolute property in the news as such. The rule that a court of equity concerns itself only in the protection of property rights treats any civil right of a pecuniary nature as a property right. * * * And the right to acquire property by honest labor or the conduct of a lawful business is as much entitled to protection as the right to guard property already acquired. * * * It is this right that furnishes the basis of the jurisdiction in the ordinary case of unfair competition." 248 U. S. 234, 236, 39 Sup. Ct. 71 (63 L. Ed. 211, 2 A. L. R. 293).

The appropriation of the news gathered by the Associated Press was enjoined.

In Bell v. Locke, 8 Paige, Ch. 75, 34 Am. Dec. 371, the plaintiff sought to restrain the defendant from assuming the name of the plaintiff's newspaper for the fraudulent purpose of imposing upon the public and supplanting him in the good will of his paper. It was held that by simulating the name and dress of his newspaper with the intent to cause it to be understood and believed by the community that the defendant's newspaper was the same as the complainant's, and thereby to injure the circulation of the latter, the plaintiff would be entitled to an injunction; for, although the business of publishing newspapers ought, in a free country, to be always open to the most unlimited competition, fra- and deception certainly are not essential to the most perfect freedom of the press. There is indeed no patent right in the names. There can be very little excuse for the editor of a newspaper who shall adopt the precise name and address of an old established paper which would be likely to interfere with the good will of the latter by actually deceiving its patrons.

In Estes v. Williams (C. C.) 21 Fed. 189, it appears that a person in London, England, published a series of juvenile books of uniform appearance and in a style of peculiar attractiveness and called them "Chatterbox" until they became widely known and quite popular by that name in that country and this. He assigned the exclusive right to use and protect that name in this country to the plaintiff. The defendants commenced the publication of a series of books and called them by that name and made them so similar in appearance and style as to lead purchasers to think that they are the same. Held, that the plaintiff was entitled to equitable relief.

The principle which interdicts unfair competition in trade will protect a publisher who has imparted to his books peculiar characteristics which enable the public to distinguish them from books published by others and containing the same literary matter against the copying of the characteristics though the copyright on the literary matter has expired. Merriam Co. v. Straus (C. C.) 136 Fed. 477; Merriam Co. v. Saalfield Pub. Co., 238 Fed. 1, 151 C. C. A. 77.

Even in the case of a patented article like the Singer sewing machine, where on the expiration of the patent the right to use the name of the patentee passes to the public, it is unlawful to so design a machine and place the name thereon as to deceive the public into believing that the machine made by a new company was actually made by the old Singer Manufacturing Company. Singer Mfg. Co. v. June Mfg. Co., 163 U. S. 169, 16 Sup. Ct. 1002, 41 L. Ed. 118.

In McLean v. Fleming, 96 U. S. 245, 251 (24 L. Ed. 828), it was held that no trader can adopt a trade-mark so resembling that of another trader as that ordinary purchasers buying with ordinary caution are likely to be misled. The Court in discussing the question say:

"Equity gives relief in such a case, upon the ground that one man is not allowed to offer his goods for sale, representing them to be the manufacture of another trader in the same commodity. Suppose the latter has obtained celebrity in his manufacture; he is entitled to all the advantages of that celebrity, whether resulting from the greater demand for his goods or from the higher price the public are willing to give for the article, rather than for the goods of the other manufacturer, whose reputation is not so high as a manufacturer."

It appears from the findings of fact that the grotesque figures in respondent's cartoons, as well as the names "Mutt' and "Jeff" applied to them have in consequence of the way in which they have been exploited by the respondent and the appearance and assumed characters of the imaginary figures have been maintained, acquired a meaning apart from their primary meaning, which is known as a secondary meaning. The secondary meaning that is applicable to the figures and the names is that respondent originated them and that

his genius pervades all that they appear to do or say.

It also appears from the findings of fact that the respondent is the owner of the property right existing in the characters represented in such figures and names. They are of his creation. They were published and became well known as distinct characters before the contract was made with the appellant. Property rights in literary and other property, the product of the brain as between employer and employee, are determined by what was contemplated by the contract of employment. Root v. Borst, 142 N. Y. 62, 36 N. E. 814.

While the contract with appellant contemplated that the respondent should draw cartoons in the form of comic strips in which he would use the figures known as "Mutt' and "Jeff" and the names connected therewith as he had done prior to such contract, it did not purport to sell to appellant his property rights then existing or which might be acquired thereafter. The contract with appellant expired on August 8, 1915. The common law right of property that the plaintiff had in particular cartoons was lost when they were severally published. Caliga v. Inter Ocean Newspaper Co., 215 U. S. 182, 30 Sup. Ct. 38, 54 L. Ed. 150. The respondent does not claim to the contrary. If the copyrights were to be considered, it would appear that the respondent was the first to copyright one of his cartoons containing the well-known figure of "Mutt" and in which the name "Mutt' was applied to the figure. He also copyrighted the book in which the cartoons were designated as "The Mutt and Jeff Cartoons. By Bud Fisher." (See decision December 22, 1916, by examiner of interferences denying an application of the Star Company to cancel the registration by Fisher of the words "Mutt and Jeff" as a trade-mark, March 9, 1915. Official Gazette of the United States Patent Office, vol. 236, No. 1, p. 283.) The name "Bud Fisher" was used by the respondent in connection with his work as a cartoonist.

As we have already stated, it is unnecessary to discuss the question of the rights of the public or of the appellant to reproduce the particular cartoons that have been published because the plaintiff's claim in this action rests upon other facts and principles as stated herein. The figures and names have been so connected with the respondent as their originator or author that the use by another of new cartoons exploiting the characters "Mutt and Jeff" would be unfair to the public and to the plaintiff. No person should be permitted to pass off as his own the thoughts and works of another.

If appellant's employees can so imitate the work of the respondent that the admirers of "Mutt and Jeff" will purchase the papers containing the imitations of the respondent's work, it may result in the public tiring of the "Mutt and Jeff" cartoons by reason of inferior imitations or otherwise, and in any case in financial damage to the respondent and an unfair appropriation of his skill and the celebrity acquired by him in originating, producing and maintaining the characters and figures so as to continue the demand for further cartoons in which they appear.

The only purpose that another than respondent can have in using the figures or names of "Mutt" and "Jeff" is to appropriate the financial value that such figures and names have acquired by reason of the skill of the respondent.

All concur, except CRANE, J., who dissents on the ground that plaintiff seeks to maintain rights which can only be had under the copyright law. The copyright law does not apply, and the plaintiff has no rights thereunder. This action in my judgment is in effect a substitute for the rights which the plaintiff might have had under the copyright law.

Judgment affirmed.

NOTE—*Right of Cartoonist to Protection of His Work.*—In addition to the many cases cited and discussed in the foregoing published opinion reference might be made to that of Outcalt vs. New York Herald, 146 Fed. 205. A cartoonist had made pictures for a comic section of the *New York Herald* in which "Buster Brown" was the principal figure. A similar comic section was printed by a newspaper published by the appellant, and the New York Herald Company, brought an action against the appellant. From the opinion in that case it appears that the suit was solely to restrain an infringement of a trade-mark and the court says: "No question as to copyright or as to unfair competition is presented."

In the case of New York Herald Company vs. Ottawa Citizens' Company, 41 Can. Sup. Ct. 229 it was held that the term "Buster Brown" or "Buster Brown and Tige", used as the title to a comic section of a newspaper, cannot be registered as a trade-mark. The Court said: "The production which the appellant sells is not a kind of paper, or of paper colored in any particular way or covered with a peculiar kind of ink or set form or figures. It is the nonsense that is produced by the brain of the man writing for the diversion of the idle that in truth is sold. It may be that kind of brain product that the copy-

right might amongst other things be extended to or that copyright might cover. * * * I am quite sure it never was intended those sections should apply to such a thing."

"Unfair competition ordinarily consists in the simulation by one person, for the purpose of deceiving the public, of the name, symbols, or devices employed by a business rival, or the substitution of the goods or wares of one person for those of another, thus falsely inducing the purchase of his wares and thereby obtaining for himself the benefits properly belonging to his competitor. Furthermore it is held that one who offers the goods of one manufacturer under the well known names and established reputation of articles of another manufacturer for the purpose of deceiving the public and defrauding the latter aggravates, rather than justifies, his wrong by placing his own name on the packages. The same principle has also been applied in the case of newspapers and other publications." 26 R. C. L. 875, 876.

ITEMS OF PROFESSIONAL INTEREST.

PROGRAM OF THE MEETING OF THE KANSAS BAR ASSOCIATION

The 39th annual convention of the Kansas Bar Association will be held at Hutchinson, Nov. 21st and 22nd, 1921, with headquarters at the Bisonte Hotel.

The President's address will be delivered by Mr. Ben S. Gaitskill of Girard. Following his address will be the usual reports of the Secretary, Treasurer, Executive Council and standing committees.

The morning session of Nov. 21st will close with an address by a representative of the University of Kansas Law School on the subject, "The Doctrine of Public Interest Impressed Upon Private Property." In the afternoon of Nov. 21st Mr. F. Dumont Smith of Hutchinson will address the Association on the subject, "Shall the Bar Association of the State of Kansas Make Recommendations to the Electors With Reference to Candidates for Judicial Offices in the State?" A general discussion of this subject will be in charge of Mr. C. M. Williams, of Hutchinson. In the evening Hon. Cordenio A. Severance, of St. Paul, President of the American Bar Association, will deliver the annual address. His subject will be, "Present Day Problems."

Tuesday, Nov. 22d, wil be devoted to the business of the Association. There will be memorial services before the Supreme Court for members of the bar of Kansas who gave their lives in the Service. There will be unveiled a bronze tablet, presented by the Bar Association, and the acceptance of the tablet by the Supreme Court.

One of the interesting reports of a special committee will be that on the incorporation of the Bar of Kansas. A discussion of this report will probably take a large part of the evening session.

The banquet will be at 6:30 Tuesday evening.

CONSTITUTIONALITY OF THE NINETEENTH AMENDMENT

A motion has been made in the Supreme Court of the United States to advance the case of Fairchild v. Hughes (Oct. 7, 1921, No. 148) on the docket for an early hearing in view of the important issue therein.

This case involves the constitutionality of the nineteenth amendment. It was brought in the Supreme Court of the District of Columbia before the Secretary of State issued his proclamation declaring the ratification of the nineteenth amendment by three-fourths of the states under Article V of the Constitution. It was brought to restrain him from issuing the proclamation declaring such ratification and to restrain the Attorney-General of the United States from enforcing the provisions of the said amendment if it should be declared by the Secretary of State to have been ratified by three-fourths of the states and to have become an integral part of the Constitution of the United States. Proces was served upon the Secretary of State and on the Attorney General before the said proclamation was issued and the Court is asked to direct the Secretary of State to rescind the proclamation of ratification which he made *pendente lite* and with knowledge that the suit was brought to enjoin him from so doing. This proclamation now appears upon the official edition of the laws of the United States and is *prima facie* evidence of the existence and validity of the said nineteenth amendment.

This case brings up for consideration several interesting questions, some of which have already been decided in the cases involving the constitutionality of the eighteenth amendment. These points are as follows:

1. It involves the question whether the ratification of the Constitution by the thirteen original states was upon the condition that certain amendments to constitute a bill of rights should be adopted and become an integral part of that instrument, and should express fundamental rights of the states and the citizens thereof which could not be divested in the case of any state except by its consent.

2. It involves the question whether a state can be said to have the republican form of government which is guaranteed by § 4, Article IV of the Constitution, when, without its consent, it is deprived of the right to regulate the suffrage within that state for the officers thereof.

3. It involves the question whether the said nineteenth amendment is beyond the scope of the power to amend, conferred by Article V of the Constitution, and it involves an examination into the validity of the ratification of the nineteenth amendment by numerous state legislatures. The Secretary of State held that he had no power to enquire into the validity of any such ratifications and refused to examine the same.

CORRESPONDENCE.

REFORMING THE LAW RELATING TO REMOVAL OF CAUSES.

Editor, Central Law Journal:

In your correspondence column this week there appears a letter to the editor of the *Central Law Journal*, written by Mr. Everett P. Wheeler, setting forth the recommendations of the Committee on Jurisprudence and Law Reform of The American Bar Association.

Recommendation numbered one is a bill which would "in effect give to the defendant where the cause is otherwise removable the right to remove to the District in which the suit is brought, even though it could not originally have been brought in that District."

It would seem that there can be no logical reason why a cause which cannot be brought originally in the Federal Courts should be removable thereto when commenced in the State Courts.

The writer would very much appreciate an explanation by Mr. Everett P. Wheeler of the true reasons for this recommendation, the names of those introducing the same, and an explanation of the advantages to be gained by Congressional action in accordance with such a recommendation.

Will Everett P. Wheeler kindly explain the purposes and advantages of this "much needed reform"?

Respectfully,

IRL MORSE.

St. Paul, Minn.

[We have asked Mr. Wheeler to explain the recommendation referred to by our correspondent.—ED.]

HUMOR OF THE LAW.

Visitor to Public Library: I'd like to see some standard works on the chemistry of fermentation, please.

Librarian: You'll have to wait your turn, sir. All the books we have on the subject are in use. Just take your place at the end of that long line of people over there.

Mrs. Lafferty: "Tin stiches did th' doctor have to take in me ould man."

Mrs. O'Hara: "Tin, was it, only tin? Sure, when th' doctor seen my poor husban' carried fr' th' wreck on th' railroad, he sez, sez he: 'Do there be no one here wid such a t'ing as a sewing machine?"

William Lawrence, Bishop of Massachusetts, told this story at a recent reunion of the class of '71, at Harvard College:

"Once when there was a vacancy in the Massachusetts bishopric, Phillips Brooks was the most likely candidate. I was walking with President Eliot ane day and, in the course of conversation, I said to him, 'Do you think Brooks will be elected?'

"'Well, no,' said Dr. Eliot,, 'a second or third rate man would do as well.'

"Phillips Brooks was elected and a short time afterward Dr. Eliot and I were walking again. 'Glad Brooks was elected, aren't you?' I asked.

"'I suppose so,' returned Dr. Eliot, 'but to tell the truth, William, you were my man.'"—*Everybody's for November.*

Six jurymen had been excused on one pretext or another, and when the judge reached the seventh he waxed sarcastic. "Does your sick wife need your attention?"

"No, sir; I ain't married," was the reply.

"What about your business?" was inquired.

"Haven't got any."

"No fence to fix up?"

"Haven't got a fence on the place," was the response.

"You think you can spare a little time to serve on the jury.

"I do, sir," came the prompt reply.

The judge meditated.

"You seem to be the only man who has got time to serve his country as a juryman," he said. "Would you mind telling me how it happens?"

"Certainly!" replied the juror. "You're going to try Jim Billings, ain't you? Well, he shot a dog of mine."

WEEKLY DIGEST.

Weekly Digest of Important Opinions of the State Courts of Last Resort and of the Federal Courts.

Copy of Opinion in any case referred to in this digest may be procured by sending 25 cents to us or to the West Pub. Co., St. Paul, Minn.

1. **Acknowledgment**—Presumed to be True.—A certificate of acknowledgment will not be overthrown on evidence of a doubtful character, such as the unsupported testimony of interested witnesses, or on a bare preponderance of the evidence, but only by proof so clear and convincing as to amount to a moral certainty. Kelly v. Kelly, N. Y., 189 N. Y. S. 804.

2. **Attorney and Client**—Authority of Attorney.—An attorney at law has no authority to bind his client by a compromise agreement resulting in a consent judgment in direct opposition to the instructions of his client, and with the knowledge of the adverse party of such violation of instructions. Patterson v. Georgia Gravel Co., Ga., 108 S. E. 237.

3. **Automobiles**—Duty to Guest.—An automobile driver is required to use reasonable and ordinary care not to increase the danger to one riding with him by invitation by fast and reckless driving, and if injury to the guest was directly or proximately caused by the driver's negligence, he is liable, in the absence of contributory negligence. Spring v. McCabe, Cal., 200 Pac. 41.

4. **Bankruptcy**—Voluntary Petition.—Directors of a Delaware corporation, with by-laws conferring on the directors power to manage the business and property of the corporation, and also general power to do all lawful acts and things not directed or required to be done by the stockholders, held to have power to authorize the filing of a petition in voluntary bankruptcy. In Re Ann Arbor Mach. Corporation, U. S. C. C. A., 274 Fed. 24.

5. **Banks and Banking**—Insolvency.—Suit of the liquidating agent of an insolvent Oklahoma bank for debt and foreclosure of an alleged lien on an oil and gas lease held not on a promissory note and drafts executed and drawn by the defendant and also on an agreement in an accord and satisfaction settlement, in violation of plaintiff's inability to sue both on the instruments of liability and on the contracts attached to his petition. Golden Rod Oil Co. No. 1 v. Noble, Tex., 233 S. W. 524.

6.——Liability for Note.—The cashier of a bank, clothed with more power than cashiers ordinarily have, being in active control of all the bank's business, exercising and possessing full power to act in all matters, could bind the bank by accepting a note executed by the maker to the bank on condition he should not be held liable thereon, and in suit by the bank's successor against the maker on such note, such agreement made by the predecessor bank's cashier constitutes a defense. Central Bank of Bingham v. Stephens, Utah., 199 Pac. 1018.

7.——Receiver of National Bank is "Officer of United States."—A receiver of an insolvent national bank is an "officer of the United States," within the meaning of Criminal Code, § 97, and Act March 4, 1911, and subject thereunder to prosecution for embezzlement of the funds of the bank, or for making a false report of its condition with intent to deceive. Weitzel v. United States, U. S. C. C. A., 274 Fed. 101.

8.——Refusal of Draft.—In an action against a bank, which refused to pay a draft drawn against a letter of credit issued by it, only the reason given by the bank for its refusal to pay can be considered. International Banking Corp. v. Irving Nat. Bank, U. S. D. C., 274 Fed. 122.

9. **Bills and Notes**—Bona Fide Holder.—A bank purchasing with full knowledge that the note was given to pay insurance premium prior to delivery of policy held not a bona fide holder. Stockmen's State Bank v. Fisher, Neb., 184 N. W. 55.

10.——Ownership.—In action against a corporation on its bond certificates by original promisee's assignee, the possession of the certificates by the promisee at the time of assignment to plaintiff, and his act in assigning them, was presumptive evidence of delivery to him and of his ownership of certificates at the time he made the assignment, under Code Civ. Proc. § 1963, subd. 12. Snyder v. United Properties Co., Cal., 200 Pac. 366.

11.——Proper Signature.—Under Code 1907, § 1, defining signature as including mark, etc., where defendant signed a note by mark, and it was witnessed by the payee's wife, there was a sufficient attestation and signature if she could not write. Smith v. Vaughn, Ala., 89 So. 302.

12.——Renewal.—Although a note and mortgage were given in bulk renewal of two notes, they were supported by an adequate consideration of money lent. Henson v. Gunn, Ala., 89 So. 288.

13. **Cancellation of Instruments**—Counterclaim.—There being doubt as to the right of defendant fire insurer to assert as a defense to the action a certain condition of facts tending to show plaintiff had not complied with a condition precedent to issuance of policy to him, defendant insurer is entitled to assert on the facts alleged its counterclaim for recission of the contract on tender of the amount received for premium that the whole issue may be presented to the court. Park & Pollard Co. v. Industrial Fire Ins. Co., N. Y., 189 N. Y. S. 866.

14.—Laches.—Where the heirs waited six years after acquiring constructive notice of deeds delivered at grantor's death by the recording thereof, and after possession was taken by the grantees and the property was omitted from the inventory of the grantor's estate during which time the grantees had made improvements on the property and had sold some of it, the heirs were guilty of such laches as bars their right to attack the deed for want of failure of delivery in grantor's lifetime. Pickens v. Merriam, U. S. C. C. A., 274 Fed. 1.

15. **Carriers of Goods**—Bill of Lading.—Where a carrier has filed a form of bill of lading for interstate shipments with the Interstate Commerce Commission and such form has been approved by the Commission, a provision therein to the effect that no claim for loss or damage can be enforced unless notice of such claim was given in writing within the time prescribed therein cannot be waived by the carrier. Carbic Mfg. Co. v. Western Express Co., Minn., 184 N. W. 35.

16. **Carriers of Live Stock**—"Inherent Vice."—An instruction that "inherent vice" in an animal is some quality or characteristic of the animal that brings about its own injury or destruction, without fault on the part of any other supervening cause, was in the main correct, and no probable error was shown by its submission. Texas & P. Ry. Co. v. Prunty, Tex., 233 S. W. 625.

17. **Carriers of Passengers** — Defective Door.—That a door of an interurban car equipped with an automatic catch or spring to keep the door open closed on a passenger's hand spoke for itself, and raised an inference that the catch was defective, though there was testi-

mony that after the accident the conductor examined the catch and found it in good condition. Anderson v. Kansas City Rys. Co. Mo., 233 S. W. 203.

18. **Constitutional Law.**—Ball Rent Law.—The provision of Ball Act, §§ 106, 108, making the findings of the rent commission, from which no appeal was taken, final and conclusive, is constitutional since the act provides for a hearing after notice, and for an appeal from the commission's decision, which satisfies the guaranty of Const. Amend. 5, against deprivation of property without due process of law. Killgore v. Zinkhan, D. C., 274 Fed. 140.

19.——Disloyal Utterances. — Language charged to have been used by defendant in referring to the President and the army when the United States was at war, in violation of Espionage Act June 15, 1917, tit. 1, § 3, as amended by Act May 16, 1918, § 1, held not within the protection of Const. U. S. Amend. 1. Dierkes v. United States, U. S. C. C. A., 274 Fed. 75.

20.——Meaning and Effect of Constitution. —A constitution intended as the fundamental law for the government of the state cannot be subject in its meaning and effect to another instrument, as it would not then be final, and such other instrument would be the paramount law. Loring v. Young, Mass., 132 N. E. 65.

21. **Corporations**—Place of Meetings.—Under the general rule that a corporation as an artificial person must dwell in the state of its creation, and has no legal existence outside of the boundaries of the sovereignty by which it is created, its incorporators or stockholders, as the corporate entity, cannot hold meetings in another state for the performance of strictly corporate functions, such as accepting the charter and organizing the corporation. Hening & Hagedorn v. Glanton, Ga., 108 S. E. 256.

22.——Stock Transfers.—Where the corporation recorded the transfer of stock on the stubs from which the certificates were detached and kept no other record thereof, such stubs constituted the transfer book of the corporation and were evidence of the transfers noted thereon. Ohman v. Lee, Minn., 184 N. W. 41.

23.——Ultra Vires.—Where, on a sale of property by an insurance company to a realty company, stockholders were invited to exchange their stock for stock in the realty company, stockholders who participated in the exchange could not attach the sale as ultra vires, illegal, and void. Tryson v. Southern Realty Corporation, D. C., 274 Fed. 135.

24. **Damages**—Loss of Profits.—In an action by a lessee of the exclusive right to operate a certain game at a pleasure resort, against defendant, who had induced the lessor to break its contract with the lessee, and permit defendant to operate such a device, the lessee was limited in its recovery to damages sustained, and could not recover profits of defendant, since such profits could be recovered only if the defendant had used plaintiff's property. Gonzales v. Reichenthaler, N. Y., 189 N. Y. S. 783.

25. **Dedication**—Public Use.—It is not essential to constitute a valid dedication to the public that the right of use should be vested in a corporate body. If there be a dedication of land to public use prior to the existence of a municipal corporation then, upon such corporation being organized, including such land within its limits, the use of the land in trust for the public at once vests in it. City of La Fayette v. Walker County, Ga., 108 S. E. 218.

26. **Electricity**—Franchise.—Where an electric company furnished electricity for lighting under a constitutional franchise under Const. art. 11, § 19, it did not surrender that franchise by becoming a bidder for and accepting a franchise under Oakland City Charter, art. 20, and a provision of the latter franchise for payment to the city of a percentage of the gross receipts is invalid as far as concerns revenues from electricity furnished for lighting purposes. City of Oakland v. Great Western Power Co., Cal., 200 Pac. 395.

27.——Obligation to Furnish.—A public service corporation such as an electric light and power company cannot, by procuring a franchise to supply particular locality, even though the franchise was obtained before passage of the Public Service Act, stand by without taking steps to supply the locality and exclude other companies therefrom. Fogelsville & Trexlertown Electric Co. v. Pennsylvania Power & Light Co., Pa., 114 Atl. 822.

28. **Fraud**—Measure of Damages.—The measure of damages recoverable in an action for deceit in inducing the purchase of stock in a trust company is the difference between the value the stock would have had if defendant's representations had been true and the real value of the stock at the time of its purchase less dividends received by plaintiff, and with interest from the date of purchase. Morrow v. Franklin, Mo., 233 S. W. 224.

29. **Frauds, Statute of**—Presumption of Written Contract.—In an action on a contract within the statute of frauds, on a general demurrer to the petition, a presumption arises that the contract was in writing. Sonnenberg v. Ernst, Tex., 233 S. W. 564.

30.——Royalties.—An inventor, entitled under a contract to a royalty on every machine manufactured and sold, could recover royalties due on the machines manufactured during the first year, though the contract was for a definite period of time exceeding one year, and was not in writing, as required by the statute of frauds, since where a series of things is to be done occupying in the whole more than 1 year, but each item as it is performed drawing with it a separate liability therefor, the statute of frauds does not prevent an action upon such items as are performed within the year to recover the stipulated compensation. Price v. Smith Mfg. Co., Cal., 200 Pac. 53.

31. **Injunction**—Strikes.—Where employers, whose business require the employment of a number of workmen skilled in a particular trade, determine to operate their business on a nonunion basis, and to that end adopt a policy not to employ members of the union, and to employ nonunion workmen under a contract terminal at will, providing that such employment shall immediately cease if said employees become members of the union, equity will protect by injunction such contractual status as against strangers and striking former employees, who, knowing such status, conspire to coerce the employers to abandon the policy of employing only nonunion labor and to cause a breach of the aforesaid contractual relation, and who endeavor by threats, intimidation, and improper persuasion to deprive such nonunion employees of the exercise of their own freedom of will, and thus induce them to violate their contracts of employment by joining the union, and thus force the unionizing of the plants or render it impossible to continue the operation of the business. McMichael v. Atlanta Envelope Co., Ga., 108 S. E. 226.

32. **Insurance**—Military Service.—Under a life insurance policy limiting the insurer's liability, unless the insured, if he engaged in military service in time of war, paid an extra premium within 31 days, where insured, more than 31 days after entering an officer's training school, wrote to the company's agent, informing him of such fact and asking whether, if he died in the service, his beneficiary could collect, to which the agent replied that she could, but that, when he received his commission, he must pay the extra premium, whereupon insured wrote, enclosing a check for the regular premium, and stating he understood from the agent's letter that until he went abroad there was no extra premium, and the agent accepted the premium and made no reply, such letter was admissible, the evidence showing it had been received, and the contents, if correctly stated by plaintiff, tending to show waiver, which was for the jury. Ryan v. New England Mut. Life Ins. Co., S. C., 108 S. E. 182.

33. ——Misrepresentations — Admission in proofs of death as to insured's ill health at time policy issued not conclusive as to whether such condition contributed to her death.—Bultralik v. Metropolitan Life Ins. Co., Mo., 233 S. W. 250.

34.——Payment of First Premium.—In such case, where a rule of the company permits the

agent to take a note of the insured payable to himself for the first premium, the agent being held responsible to the company for the net premium, the agent becomes the debtor and when he delivers the policy to the insured under an agreement to extend the time of paying the premium and to take the note of the insured for such premium, but no note is given for the reason that the agent had no blank forms with him at the time, and it was agreed that the agent would see insured in a few days and get the note, and the agent left the city two days thereafter without procuring the note, and before his return the insured died, such transaction will be deemed a payment of the premium as between the insured and the company. Echols v. Mutual Life Ins. Co., Neb., 184 N. W. 58.

35. **Intoxicating Liquors**—"Shipment" in Interstate Commerce.—Criminal Code, § 240, making it a criminal offense to "knowingly ship" any package containing liquor from one state into another, unless the package is so labeled as to clearly show the name of the consignee and the nature and quantity of the contents, and subjecting liquor shipped in violation thereof to forfeiture, held not to apply to a carriage of liquor from one state to another by the purpose from a concern which was not a the owner in a truck hired with a driver for common carrier nor engaged in the business of transportation, but in the business of letting trucks, with drivers, by the day or trip. One Truck Load of Whiskey v. United States, U. S. C. C. A., 274 Fed. 99.

36.——"Violation of Law."—The sale of intoxicating liquor in Ohio is a violation of § 9, article XV, of the Constitution of Ohio as amended in November, 1918, and such a sale is therefore a "violation of law," within the meaning and description of § 13195, General Code. Hoffrichter v. State, 101 Ohio St. 65, 130 N. E. 157, approved and followed. Stiess v. State, Ohio, 132 N. E. 85.

37. **Landlord and Tenant**—Construction of Lease.—Lease requiring lessee manufacturing company to pay for electricity furnished in excess of "eight horse power" held to entitle lessee to electricity to the extent of eight horse power actually consumed, in the absence of a provision specifying whether the power was to be based on the rated capacity of the motors or on the power actually consumed. Eisenstadt Mfg. Co. v. Star Bldg. Co., Mo., 233 S. W. 285.

38.——Option to Purchase.—Where a lease provded an option for renewal for three years from its expiration on same terms and conditions, and not for a new lease containing like agreements and covenants, the right to purchase the demised premises under an option clause of the original lease is not enforceable after expiration of the original lease and renewal under the option, since it was an independent covenant collateral to the demise, and not a term or condition of the demise. Masset v. Ruh, N. Y., 189 N. Y. S. 752.

39.——Unreasonable Rent Statute.—Laws 1920, c. 136, relating to fixing of reasonable rents, does not apply to a lease made prior to April 1, 1920, when the law became operative, since the law has no retrospective application. Orinoco Realty Co. v. Bandler, N. Y., 189 N. Y. S. 855.

40. **Mandamus**—Conformance With Contract.—Where it was the duty of a street railway under its contract with a city to conform its tracks with an altered grade of the street, mandamus would lie to compel the conformance, although the street railway had liabilities of about $900,000 and cash on hand of only $450,000, and the city had other paving work in prospect upon streets which, if prosecuted all at once, would be beyond the financial ability of the company, where there were sufficient funds to carry out the project in question. City of Syracuse v. New York State Rys., N. Y., 189 N. Y. S. 763.

41. **Master and Servant**—Duty to Servant.—A master stevedore was under no duty to his longshoreman employee to look to see whether a steel ledge beneath planks covering a hatch was bent so that it would not support a plank two inches shorter than the opening. McCabe v. Turner & Blanchard, N. Y., 189 N. Y. S. 842.

42.——Fire Clay Works Held a "Mine."—A fire clay company which secured its clay from a mine shaft 70 or 80 feet deep is engaged in operating a "mine," within the meaning of Rev. St. 1919, § 4233, and hence liable for injuries sustained by a servant by reason of negligence of another of its servants. Jefferies v. Walsh Fire Clay Products Co., Mo., 233 S. W. 259.

43.——Interstate Commerce.—A member of a railroad switching crew, injured while walking through the yards from the railroad company's office to an office to which the crews reported for the day's work, was engaged in interstate commerce, where he had been switching interstate cars on the preceding day, and the crew of which he was a member immediately after the injury was switching cars carrying interstate freight. Rabee v. Boston & M. R. R., N. Y., 189 N. Y. S. 863.

44.——Interstate Commerce.—Railroad employee injured while engaged in the repair of an engine which had been placed in the roundhouse for repairs after having finished its round trip, to remain in the roundhouse until completion of the work of repairing, held not engaged in "interstate commerce" at the time of the injury, within the Federal Employer's Liability Act, though the locomotive had been used in both interstate and intrastate commerce before being placed in the roundhouse for repairs, and although it was similarly used after the repairs had been completed. Payne v. Wynne, Tex., 233 S. W. 609.

45.——Loan of Servant.—One who is the general servant of another may be loaned or hired by his master for some special service, so as to become as to that the servant of a third party, in which case, if he is subject wholly to the direction and control of such third party, the latter, and not the general employer, is the master, so far as that particular service is concerned, and is liable for injuries caused by the negligence of such servant while engaged in the duties pertaining thereto. Burns v. Jackson, Cal., 200 Pac. 80.

46.—Negligence.—In action against a railroad and one of its employes for death of another employee, an entry of a judgment for the defendant employee on verdict exonerating him does not require court to grant judgment for the railroad found negligent where the evidence conclusively shows that agents and servants of the railroad other than the one joined as defendant are guilty of negligence contributing as a proximate cause to the accident. Donald v. Atlantic Coast Line Ry. Co., S. C., 108 S. E. 180.

47. **Mines and Minerals**—Invitee.—It being shown in an action for injury to one employed to mine by defendant, that the mining was being done through defendant's procurement, for his benefit and on his premises, over which he retained superintendence and control, maintaining a special timber gang to properly timber the roof to protect miners, if defendant or his timbermen were negligent in properly timbering the roof, and as a proximate consequence plaintiff was injured, he, in the absence of negligence proximately contributing to his own injury would be entitled to recover, though a mere invitee and not an employee. Freeman v. Worthington, Ala., 89 So. 389.

48. **Mortgages**—Foreclosure.—Where pledge foreclosed mortgages held as security for payment of debt, and took other mortgages from third person who purchased the land at the foreclosure sale as trustee for the debtor, as security for the payment of the debt, which mortgages were for a lesser amount than those previously held, pledgee's agreement to advance additional money to debtor on the execution of the mortgages by such third person was without consideration, since the execution of such mortgages was merely the substitution of one security for a lesser amount on the same prop-

erty. Perkins v. Deal Beach Realty Co., N. J., 114 Atl. 853.

49. **Municipal Corporations** — Excavated Street.—A traveler on a public street or sidewalk may ordinarily presume that the way is clear and in good condition, but, if he knows that it is torn up or obstructed by public work, he cannot go forward relying on such presumption, but must exercise his faculties to discover the dangers, and, if he fails to do so, and is injured thereby, he cannot recover, though the public authorities or contractor may have been negligent. Waldman v. Skrainka Const. Co., Mo., 233 S. W. 242.

50.——Removal of Health Officers.—A resolution of a city board of health appointing a health officer for a term of three years being justified by Health Code, § 31, such appointee holds his office for a term fixed by law, so that the subsequent recission of such resolution and the appointment of another health officer, was ultra vires and void, the first appointee not being subject to removal during the continuance of his term except for cause; act 1901, § 5, requiring the filling of all vacancies in municipal offices, created by another cause than expiration of term, for the unexpired term only, being inapplicable where the fixation of the term is not attached to the office itself, but relates only to a particular incumbent thereof, on the termination of whose right thereto the term ends. Clay v. Browne, N. J., 114 Atl. 808.

51.——Zoning Ordinances.—A city, under the Home Rule Act of 1917, as amended by P. L. 1920, p. 496, may, in the exercise of its police power, enact a zoning ordinance to promote the public health, safety, and general welfare. Cliffside Park Realty Co. v. Borough of Cliffside Park, N. J., 114 Atl. 797.

52. **Negligence**—Duty to Invitee Defined.—One who invites another to come upon his premises is bound in law to see that such premises are in such condition that the invitation may be safely accepted. Roman v. King, Mo., 233 S. W. 161.

53. **Principal and Agent**—Authority of Agent.—A person dealing with one known to be an agent is held to the exercise of reasonable prudence, and, if an agent makes an agreement, representation or promise so unusual and unreasonable as to arouse the suspicion of a man of ordinary or average business prudence, he is put upon notice and must ascertain if actual authority has been conferred. Schuster v. North American Hotel Co., Neb., 184 N. W. 136.

54. **Railroads**—Crossing. — When plaintiff was loading freight cars on a side track in the vicinity of a public crossing, and was not in the act of using the crossing, there was no duty on the part of defendant railroad company to give the usual signals of the approach of a train at the crossing. Barbeau v. Hines, N. Y., 189 N. Y. S. 690.

55.——Tort of Agent.—The federal Director General of Railroads in control of a railroad is not liable in punitive damages for the willful tort of his agents and servants. Massey v. Hines, S. C., 108 S. E. 181.

56. **Sales.** — "Fraudulent Representation" and "Warranty" Distinguished.—A fraudulent representation is an antecedent statement made as an inducement to the contract, but is not a part or arrangement of the contract; while to constitute an express warranty the statement must be a part of the contract. Griswold v. Morrison, Cal., 200 Pac. 62.

57. **Sheriffs and Constables**—Wrongful Seizure.—A sheriff who levies on property of a wife under an execution against her husband is liable for resulting damages. Gilbert v. Rothe, Neb., 184 N. W. 119.

58. **Specific Performance**—Time of Essence.—Time, in equity, not being generally deemed to be of the essence of a contract, unless the parties have expressly so treated it, or it necessarily follows from the nature and circumstances of the contract equity will enforce specific performance of a contract, though the time fixed for such performance has been suffered to pass by complaint, unless the facts show that the parties intended that such time should be of the essence of the contract. City of Newark v. Lindsley, N. J., 114 Atl. 794.

59. **States**—Immunity from Suit.—Where by its Constitution the state is immune from suits against it except as the Legislature otherwise provides, the immunity thus provided cannot be waived by a voluntary general appearance in the case and a participation in the trial thereof upon its merits by the Attorney General in an unauthorized action brought against the state. McShane v. Murray, Neb., 184 N. W. 147.

60. **Street Railroads**—Humanitarian Rule.—In an action for injuries from being run over by a street car, in which the allegations in the petition as to the failure of defendant's motorman to stop the car, slacken its speed, and give warning were in the disjunctive, an instruction so placing them, though it left out of consideration the slackening of speed, was not error, where plaintiff submitted her case on the humanitarian rule alone; it being unnecessary that the jury find all three of the things specified in the petition. Hill v. Kansas City Rys. Co. Mo., 233 S. W. 205.

61. **Telegraphs and Telephones**—"Interstate Commerce."—The transmission of a telegram between points in the state by a route through another state, uniformly adopted and used at the time, is "interstate commerce," governed exclusively by the federal Interstate Commerce Act, as amended by Act Cong. June 18, 1910, § 7, so that damages for mental anguish for nondelivery are not recoverable. Western Union Telegraph Co. v. Barbour, Ala., 89 So. 299.

62. **Trade Unions**—Damages for Wrongful Expulsion.—The damages recoverable against the association are such as are the direct and proximate result of the expulsion, such as the inability of the expelled member to secure employment at his trade in the locality where he was employed. Stenzel v. Cavanaugh, N. Y., 189 N. Y. S. 883.

63. **Trusts**—Resulting Trust.—Where deeds to a wife for land purchased by her husband were absolute deeds, the fact that she importuned and persuaded him to take title in her name for the benefit of herself and their heirs and children, so that in case he should become unfortunate or have judgments entered against him provision would be made for the family, did not create a resulting trust. Gibbs v. Gibbs, Ga., 108 S. E. 214.

64. **Vendor and Purchaser**—Breach of Contract.—Where defendant purchased land with knowledge that the vendor had contracted to sell to plaintiff, plaintiff's right of specific performance was not affected, and he had no right of action against defendant for inducing the vendor to break his contract and sell the land to him. Sonnenberg v. Hajek, Tex., 233 S. W. 563.

65. **War**—Government Contract.—Though a contract by a wool dealer, whereby he agreed to the limitation of profits fixed by regulations of the War Industries Board, was entered into under stress of war conditions, such conditions do not avoid the contract, or excuse failure to perform it where it is not known that there was either coercion or duress. United States v. Powers, U. S. D. C., 274 Fed. 131.